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No. 139

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1906.

WILMINGTON STAR MINING COMPANY,
Plaintiff in Error,

vs.

MINNIE FULTON,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

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BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT OF FACTS.

MAY IT PLEASE THE COURT:

The jurisdiction of this court is invoked in this case on the ground that the Illinois Mining Act under which the case is brought is repugnant to that portion of the 14th Amendment to the Constitution of the United States, to the effect that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or prop-

erty, without due process of law, nor deny to any person within its jurisdiction equal protection of the laws.

It is claimed that the act by requiring mine managers, mine examiners and hoisting engineers, to obtain certificates of competency before taking such positions, and by enumerating certain duties required of them, and at the same time requiring the mine owner to employ in their mines such certified employes, restricts the mine owners' choice to a class and takes from him in part the control of such employes, while holding him liable for their negligence, and is thereby repugnant to the constitutional amendment referred to. This is the only constitutional point involved in the case.

We deny that the constitutional point attempted to be raised is a real substantial issue in the case, necessary to its decision, and have discussed this question at some length under separate cover in the form of a motion to dismiss the writ of error herein, and respectfully refer the court to the suggestions presented in support of that motion. However, that motion is based only on the face of the record before the court and the merits of the case are not touched upon in any regard. Therefore we feel it our duty to discuss the various points in the case fully, as owing to the financial circumstances of defendant in error it will be impossible for her counsel to appear before the court in person to argue the case orally.

This suit was originally instituted in the Circuit Court of Grundy County, Illinois, and was removed by plaintiff in error to the United States Circuit Court

on the ground of diversity of citizenship. Upon the first trial of the case in that court the jury were instructed by the trial judge to find for the defendant. The plaintiff appealed from the judgment of the court to the Circuit Court of Appeals for the Seventh Circuit, and the case was reversed and remanded by that court. (See *Fulton* v. *Wilmington Star Mining Co.*, 133 Fed. Rep., 193.) The court of appeals in its opinion passed upon all the substantial questions now submitted for the consideration of this court.

The suit was brought by Minnie Fulton, the defendant in error, to recover damages under the statute, for loss of support suffered by herself and her five small children by reason of the killing of her husband, Samuel Fulton, in the coal mines belonging to plaintiff in error.

The accident complained of herein occurred in the west roadway of what was known as Mine No. 6 situated at Coal City, Grundy County, Illinois. This was a new mine and the excavations necessary for working it to its full capacity were not completed. (Rec., 62.)

By reference to the plat (Rec., 61) it will be seen, that four principal roadways extended from the main shaft running respectively north, south, east and west. The south and west roadways were not connected with the escapement shaft and had no natural ventilation whatsoever, so that the only way to force air into these roadways and thereby dislodge the accumulations of gas, was by means of a fan run by steam power.

On Sunday, January 27, 1901, Samuel Fulton went to the mine by direction of John Wilson, the com-

pany's mine manager to lay tracks in the west roadway. Wilson, the mine manager, and Pierard, the mine examiner and two laborers named respectively Moses Capet and Leopold Schmitz, were also present to do certain work in connection with the ventilation of the mine. Pierard and Capet arrived at the mine a little before seven in the morning and immediately descended into the mine and went into the south roadway and started work there (Rec., 33) putting in air boxes to aid in the ventilation of that roadway. Fulton arrived at the top of the mine at about the same hour, but stopped to put some tools and material necessary for his work on a car and in this was assisted by Wilson, and somewhere between 7:30 and 8 o'clock they descended into the mine. (Rec., 51 and 65.)

Upon their arrivel at the foot of the shaft the other men congregated together, and for the first time an effort was made to start up the ventilation. To do this it was necessary to start the fan going, and it appears that a wheel on one of the valves of the pump was missing and it was necessary in order to turn it to go to the surface and procure a monkey wrench. This was done by Wilson (Rec., 34) and upon his return the steam was turned on and the fan started. *This must have been nearly an hour after the mine examiner first entered the mine.* As soon as the fan was started Pierard, Schmitz and Capet went into the south roadway to resume their work (Rec., 35), Wilson and Fulton remaining at the foot of the shaft. In a few minutes thereafter Wilson called to Schmitz to go and assist Fulton. Schmitz testified, that Wilson was present at the bottom of the shaft when he started to help Fulton with his work. He said

that Wilson was near the little engine when they started to push their car into the west roadway and was right close to him, in fact he had to push Wilson back with his hand so that the rails on the car would not strike him. (Rec., 53.) And further on (Rec., 56) he testified, that Wilson told him not to wait but to go with Fulton. As soon as they departed Wilson returned to the south roadway and within a few moments a tremendous explosion occurred (Rec., 53) which knocked down Wilson, Pierard and Capet and put out the lights they were carrying; at the time they were from 100 to 150 feet away from the point where Fulton's body was found and there was a thick wall of coal between them. Upon recovering they went into the west roadway and met Schmitz crawling out and found the dead body of Fulton lying on his back at a point about 80 or 100 feet west of the main shaft. (Rec., 37.)

It is admitted by Wilson and Pierard (Rec., 39-70), that it was well known that there was gas in the west roadway and Pierard testified (Rec., 32, 33) that he generally started the fan in the morning about 5 o'clock, that is, about an hour or an hour and a half before the men went to work, and that in addition to this he used a sack or some other similar article to assist in dislodging the accumulations of gas (Rec., 32), and then went down with a safety lamp to examine the mine and see that it was all right before the miners went to work, but on this morning (Rec., 34) although he knew there was gas in the mine and that the men were coming down to work he made no effort to clear it of gas.

Wilson, the mine manager also testified, that there was always gas in the west entry (Rec., 70), and he knew that Fulton was to work in that roadway (Rec., 65), in fact he had so instructed him.

It is also admitted, that this roadway was not completed and the circuits which would eventually give it natural ventilation, at the time were not completed. (Rec., 62.)

The court will observe that defendant in error was somewhat handicapped in proving her case by the fact that Fulton was instantly killed, and Schmitz was a foreigner and his deposition was taken through an interpreter while he was laid up from the injuries he received at the same time that Fulton was killed and before the trial of the case Schmitz died of his injuries, therefore defendant in error was obliged to rely largely on the testimony of the company's own employes and officials who were in a sense hostile to her interests, because of their natural unwillingness to admit negligence and further because the statute imposed penalties for the very acts and omissions which it is alleged in this case they were guilty of.

POINTS AND AUTHORITIES.

I.

THE CONSTITUTIONAL QUESTION RAISED IN THIS CASE IS NOT A SUBSTANTIAL POINT UPON WHICH THE DETERMINATION OF THE CASE DEPENDS.

The case at bar is not subject to the constitutional objection raised by plaintiff in error for the reason that the declaration contains counts based on certain sections of the act *obviously* not repugnant to the Constitution of the United States even under the theory of plaintiff in error.

See first three counts of declaration (Rec., 4-5), and in connection therewith, Section 19 of Chapter 93 Illinois Revised Statutes, title, "Mines and Miners."

Sec. 57 of the Illinois Practice Act, Chap. 110, Rev. Stat., reads as follows:

> "Whenever an entire verdict shall be given on several counts the same shall not be set aside or reversed on the ground of any defective count if one or more of the counts in the declaration be sufficient to sustain the verdict."

In the case of *City of Chicago* v. *Lonergan*, 196 Illinois, pages 518, 520, the Supreme Court of the state held:

> "When an entire verdict is given on several counts it will not be set aside or reversed because of any defective count if one or more of the counts be sufficient to sustain the verdict."

To the same effect are the following cases:

Consolidated Coal Co. v. *Scheiber*, 167 Ill., 539, 543.

C. & A. R. R. Co. v. *Anderson*, 166 Ill., 572-575.

By Sec. 914 of the United States Compiled Statutes, title, "The Judiciary," it is provided:

> "The practice, pleadings and forms and modes of procedure in civil cases other than equity and admiralty causes in the Circuit and District Courts shal conform as near as may be to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such Circuit or District Courts are held, any rule of the court to the contrary notwithstanding."

This court has uniformly held, that the constitutional point involved must be a real and substantial point in the controversy upon the determination of which the result depends.

Western Union Tel. Co. v. *Ann Arbor R. R. Co.*, 178 U. S., 239, 243-244.

Lampasis v. *Bell*, 180 U. S., 276, 282.

Gibbs v. *Crandall*, 120 U. S., 105, 108.

Atarin v. *New York*, 115 U. S., 248, 257.

New Orleans v. *Benjamin*, 153 U. S., 411, 424.

Gold Washing & Water Co. v. *Keyes*, 96 U. S., 199, 203-4.

Even if the court should be inclined to hold portions of the Mining Law unconstitutional, it would not

necessarily invalidate the entire act, and if any count of the declaration is based on a section of the act held to be constitutional, it would be sufficient to sustain the action.

Loeb v. *Columbia Township Trustees*, 179 U. S., 472, 490.

Diamond Glue Co. v. *U. S. Glue Co.*, 187 U. S., 611, 617.

II.

THE MINING ACT OF ILLINOIS IS NOT REPUGNANT TO THE CONSTITUTION OF THE UNITED STATES.

It has always been the policy of the State of Illinois to guard with great solicitude the persons and lives of men employed in coal mining in this state. The Constitution of the state imposes upon the legislature the duty of passing laws to carry out this policy. Sec. 29 of Article 4 of the Constitution of 1870, reads as follows:

> "It shall be the duty of the General Assembly to pass such laws as may be necessary for the protection of operative miners by providing for ventilation when the same may be required and the construction of escapement shafts with such other appliances as may secure safety in all coal mines, and to provide for the enforcement of said laws by such penalties and punishments as may be deemed proper."

In pursuance of this constitutional provision the legislature of Illinois has from time to time passed laws for the protection of coal miners and has fre-

quently revised such laws, all with the purpose of surrounding the miner with greater protection.

C. W. & V. Coal Co. v. *The People,* 181 Ill., 270, 274 to 276.

Carterville Coal Co. v. *Abbott,* 181 Ill., 495, 500.

The constitutionality of the Mining Act has been attacked in the Supreme Court of the state and has been held to be constitutional by that court.

C. W. & V. Coal Co. v. *The People,* 181 Ill., 270, 272 to 278, inclusive, and cases cited therein.

The cases relied upon by plaintiff in error decided by courts outside of this state have been held to have no application to cases arising under the act in question.

When this same case was before the Circuit Court of Appeals, 7th circuit, the court after discussing the cases cited by plaintiff in error in support of the same proposition in that court, said:

> "The Pennsylvania cases we are unwilling to follow. The authority of Illinois is against them. *C., C., C. of St. L.* v. *Seniger,* 179 Ill., 370, *Riverton Coal Co.* v. *Shepherd,* 207 Ill., 395, as also the substantial considerations underlying the act. The Illinois act was passed under a mandate of the Constitution of Illinois of 1870 (Art. 4, Sec. 29) making it the duty of the legislature to pass laws for the protection of operative miners. * * *
>
> The restriction on the owner limits him, it is true, to selection from a class; but in practice, if the law be faithfully carried out, *the class will*

include all the available men competent; so that in its practical outcome, the act of 1899 *simply requires that the owner's mine manager shall be a competent man, his competency to be determined according to standards fixed by the state authority; and within this area of proven competency —and the spirit of the common law gave no larger area—the owner is at liberty to employ and discharge as he chooses."*

Fulton v. *Wilmington Star Mining Co.*, 133 Fed., 193-7.

In the case of *Henrietta Coal Co.* v. *Martin*, 221 Ill., 460, substantially the same argument was presented to the court as in this case and the very same cases now cited by plaintiff in error in support of its propositon were presented to that court, and the court discusses the cases fully and refuses to follow them on the ground that they are not consonant at all with the policy of the law of Illinois.

On pages 466-67 the court says:

"*They*—(the mine manager and examiner)—*stand for him and are vice-principals, and perform those duties, which he may not delegate to others in such manner as to relieve himself of responsibility. For any willful violation of the statute by either of them, or for any willful failure by either of them to observe its provisions, he is liable.* Such has heretofore been assumed to be the law by this court. *Donk Bros. Coal and Coke Co.* v. *Peton*, 192 Ill., 41; *Donk Bros. Coal and Coke Co.* v. *Stroff*, 200 id., 483; *Kellyville Coal Co.* v. *Strine*, 217 id., 516; *Taylor Coal Co.* v. *Dawes*, 200 id., 145.

The fact that the proprietor, if he employs men to act in these capacities, is required to employ those who have obtained the certificate from the

state mining board is without significance. The purpose of that provision was, so far as possible, to guard against the possibility of the proprietor employing incompetent, intemperate, negligent or disreputable persons, and not to enable the operator to shift to his employes his responsibility for the management of the mine.

The object of the Mining Act, as we gather from its various provisions, is to protect, so far as legislative enactment may, the health and persons of men employed in the mines of the state while they are in the mines. The principal measures prescribed for this purpose require the exercise of greater precaution and care on the part of the mine owner for the safety of the miners than was required by the common law. *To hold that he may shift his liability to any person employed by him as examiner or manager who holds the certificate of the state mining board is to lessen his responsibility and defeat in great part the beneficent purposes of the act. To hold him liable for a willful violation of the act or a willful failure to comply with its provisions on the part of his examiner or manager, is to give force and effect to the statute according to the intent of its makers and to prolong the lives and promote the safety and well being of the miners.*"

In the case of *Sherlock et al.* v. *Alling, Admr.*, 93 U. S., 99, 105, 108, inclusive, the liability of owners of a line of steamers for the negligence of pilots employed by them was passed upon by this court, and the same contentions raised here were presented in that case and the court held (quoting the 4th section of the syllabus, 100):

"The relation between the owner or master and pilot, as that of master and employe, is not changed by the fact that the selection of the pilot

is limited to those who have been found by examination to possess the requisite knowledge and skill, and have been licensed by the government inspectors."

In the case of *Consolidated Coal Co.* v. *Seniger*, 179 Ill., 370, 374, 375, the court says:

"As to the other objection, it seems defendant was prohibited by law from employing a hoisting engineer who did not have a certificate obtained from the state board of mine examiners, and Rasor had such a certificate. It is argued that by this statute the law has provided the only means by which a hoisting engineer's abilities can be ascertained, and that the efficacy of the certificate for that purpose cannot be disputed. *While the law required defendant to select its engineer from a certain class, it did not make it obligatory upon it to employ Rasor or to retain him in its employment.* It would not have been a violation of any law to have discharged him if he was found to be incompetent. If defendant had been *compelled* to employ him, there would, of course, be no element of negligence on its part in doing so, and it could not be held liable for a violation of the law on account of his unfitness. Such a certificate does not conclusively establish the competency of the person, but may be considered with other evidence upon that question. The state board of mine examiners had no power to adjudicate upon the question so as to bind the defendant or its men, and plaintiff was not debarred from proving that Rasor was in fact incompetent and unfit and that defendant had notice of it."

In *Wellston Coal Co.* v. *Smith*, 65 Ohio State, 70, the first section of the syllabus reads as follows:

"A mine boss, who has control of a mine, with

> power to hire and discharge employes, stands for and in place of the owner or operator of such mine as to matters between such employes and owner or operator, in the operation of such mine; AND THE OWNER OR OPERATOR IS CHARGEABLE WITH WHATEVER SUCH BOSS KNOWS, OR OUGHT TO KNOW, IN THE OPERATION OF SUCH MINE."

In Huffuct on Agency, Chap. 19, p. 286, title "Compulsory Employment or Service," the pilot cases are considered and distinguished, and it is said:

> "The case of limited selection has generally been decided in accordance with the usual doctrine of master and servant. So long as there is a power of selection, EVEN THOUGH AMONG A SMALL NUMBER the employer chooses his own servant, and must remain liable for his acts within the scope of the employment."

See, also:

Riverton C. Co. v. *Shepherd,* 207 Ill., 395-9.

Schmalstieg v. *Leavenworth Coal Co.,* 59 L. R. A., 707.

III.

CONSTRUCTION OF THE MINING ACT BY THE SUPREME COURT OF ILLINOIS.

The Supreme Court of Illinois has construed the Mining Act in a great many cases and has always sought to effectuate the evident purpose of the framers of the Constitution and the legislature to protect the operative coal miner as far as possible in his dangerous occupation, and to provide for those dependent upon him in case of his death through failure on

the part of the mine owner, and his representatives to fulfill the duties required by the statute.

C. W. & V. C. Co. v. *The People*, 181 Ill., 270, 273-6, inc.

Carterville Coal Co. v. *Abbott*, 181 Ill., 495, 501-2.

Deserant v. *Cerillos C. R. R. Co.*, 178 U. S., 409, 420.

Odin Coal Co. v. *Denman*, 185 Ill., 413, 417.

In the last case cited the court declared the statute in question was not a penal statute.

The word "*willful*" as used in the statute, has repeatedly and universally been held by the Supreme Court of Illinois to mean that the person of whose action or default the expression is used, is a free agent and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this: that he knows what he is doing and intends to do what he is doing and is a free agent. *An act consciously omitted is willfully omitted* in the meaning of the word, "*willful*" as used in these enactments of the legislature relative to the duty of mine owners. Where an owner, operator or manager so constructs or equips his mine that he *knowingly* operates it without conforming to the provisions of this act, he *willfully* disregards its provisions and *willfully* disregards the safety of miners employed therein.

Odin Coal Co. v. *Denman*, 185 Ill., 413, 418.

Carterville Coal Co. v. *Abbott*, 181 Ill., 495, 502.

I. C. R. R. Co. v. *Leiner,* 202 Ill., 624, 629-631, inc.

Donk Brothers Coal Co. v. *Stroff*, 200 Ill., 483, 489.

Donk Brothers Coal Co. v. *Peton,* 192 Ill., 41, 44, 45.

Spring Valley Coal Co. v. *Kowatt*, 196 Ill., 156, 160.

In this connection we invite the attention of the court to the fact that in Illinois the mine manager and mine examiner have been expressly held to be the vice-principals of the mine owner for whose violation of the statute he is liable. The Supreme Court of Illinois has held, speaking of these employes:

> "We think the effect of the statute is to require of the *owner of the mine* the performance of those duties which the statute prescribes for the mine examiner and the mine manager. * * * *They stand for him and are vice-principals,* and perform those duties which he may not delegate to others in such manner as to relieve himself of responsibility for any willful failure by either of them to observe its provisions but is liable."

Henrietta Coal Company v. *Martin,* 221 Ill., 460, 466.

Riverton Coal Company v. *Shepherd,* 207 Ill., 395, 399.

Plaintiff in error being a corporation could only act or have knowledge of an existing condition by and through its officers agents and employes, and the representatives in charge of the mine in question in this case were Wilson, the mine manager and Pierard, the

mine examiner. Notice to them of dangerous conditions in the mine was notice to the company of such conditions and their acts and omissions were the acts and omissions of plaintiff in error.

Quincy Coal Company v. *Hood, Administrator,* 77 Ill., 68, 75.

P. S. L. A. S. v. *Cannon,* 201 Ill., 260, 262.

D. & R. G. Ry. Co. v. *Harris,* 122 U. S., 597, 608, 609.

L. S. & M. S. Ry. Co. v. *Prentiss,* 147 U. S., 101, 109-111, inc.

The decisions of the highest courts of a state construing a statute of such state are conclusive and as binding as the text of the law, especially where the act is passed in conformity to the requirement of the state constitution and the statute itself relates entirely to local policy.

Balkam v. *Woodstock Iron* Co., 154 U. S., 177, 189.

Bauserman v. *Blunt,* 147 U. S., 647, 654.

Norton v. *Shelly County,* 118 U. S., 425, 440.

S. C. Ry. Co. v. *N. A. T. Co.,* 173 U. S., 99, 112.

Y. & M. V. Ry. Co. v. *Adams,* 181 U. S., 580, 583.

IV.

PROXIMATE CAUSE.

The fact that the west roadway was full of gas was the proximate cause of Fulton's death. None of the

other acts and omissions complained of would have harmed him had plaintiff in error fulfilled its primary duty in regard to freeing the mine from gas and seeing that it was properly ventilated. Proximate cause has been defined by the Supreme Court of Illinois as follows:

> "If the wrong of appellant put in motion the destructive agency and the result is directly attributable thereto and there was no intervention of a new force or power of itself sufficient to stand as the cause of the mischief the negligence of appellant must be considered the proximate cause of the injury, if it could have been foreseen by the exercise of ordinary care that injury might or would result from the negligence. An intervening efficient cause is a new and independent force which breaks the causal connection between the original wrong and the injury, and itself becomes the direct and immediate, that is, proximate, cause of an injury."
>
> *Pullman Palace Car Co.* v. *Laack,* 143 Ill., 242, 260-261.

V.

CONTRIBUTORY NEGLIGENCE ON THE PART OF FULTON WOULD NOT DEFEAT THE RIGHT OF DEFENDANT IN ERROR TO RECOVER IN THIS CASE.

"Mere contributory negligence on the part of a miner *will not defeat a right of recovery* where he is injured by the willful disregard of the statute, either by an act of omission or commission on the part of the owner, operator or manager. To hold that the same principle as to contributory negligence should be applied in case of one who is

injured in a mine because the owner, operator or manager totally disregarded the statute as in other cases of negligence *is to totally disregard the provisions of the Constitution which are mandatory in requiring the enactment of this character of legislation, and would destroy the effect of the statute and in no manner regard the duty of protecting the life and safety of miners.*"

Carterville Coal Co. v. *Abbott,* 181 Ill., 495, 502-3.

Henrietta Coal Co. v. *Martin,* 221 Ill., 460-470.

Riverton Coal Co. v. *Shepherd,* 207 Ill., 395, 399.

O'Fallon Coal Co. v. *Laquet,* 198 Ill., 125, 129.

Spring Valley Coal Co. v. *Rowatt,* 196 Ill., 156, 159, 161.

Pawnee Coal Co. v. *Royce,* 184 Ill., 402, 415.

Odin Coal Co. v. *Denman,* 185 Ill., 413, 419.

W. A. C. Co. v. *Beaver,* 192 Ill., 333.

Deserant v. *C. C. R. R. Co.,* 178 U. S., 409, 420.

It will never be presumed that a man will knowingly incur physical pain or death when he can avoid it. The presumption is, that the instinct of self-preservation will deter a man from so doing.

C. & E. I. R. R. Co. v. *Knapp,* 176 Ill., 127, 129.

C. & E. I. R. R. Co. v. *Hines,* 132 Ill., 161, 169.

The deceased had a *right to assume* that plaintiff in error would comply with its statutory duty and *was not*

bound to ascertain before going to work each time whether or not it was so doing.

Pawnee Coal Co. v. *Royce,* 184 Ill., 402, 415.
Hemingway v. *I. C. R. R. Co.,* 114 Fed. Rep., 843, 846. (C. C. A.).

The question as to whether or not an act of negligence amounts to willfulness is always for the jury.

In the case of *I. C. R. R. Co.* v. *Leiner,* 202 Ill., 624-9 the court says:

> "The question, whether a personal injury has been inflicted by willful or wanton conduct or gross negligence, *is a question of fact to be determined by the jury.* In *Chicago, Burlington and Quincy Railroad Co.* v. *Murowski,* 179 Ill., 77, we said (p. 80): 'Whether the defendant was guilty of willful or wanton conduct or gross negligence was purely a question of fact for the jury to determine from all the evidence, introduced by the respective parties, bearing upon that point in the case, and *it was not the province of the court to inform the jury that some particular fact in the case was conclusive of that question.*' (See, also, *Odin Coal Co.* v. *Denman,* 185 Ill., 413; *Carterville Coal Co.* v. *Abbott,* 181 id., 495; *Lake Shore and Michigan Southern Railway Co.* v. *Bodemer,* 139 id., 596.)"

Chicago T. R. R. Co. v. *Gruss,* 200 Ill., 195.
Donk Bros. Coal Co. v. *Peton,* 192 Ill., 41, 44.
Odin Coal Co. v. *Denman,* 185 Ill., 413, 419.
C., B. & Q. R. R. Co. v. *Murowski,* 179 Ill., 77-80.

VI.

THE JURY WERE FULLY INSTRUCTED AS TO THE EFFECT OF A WILFUL VIOLATION OF THE MINING ACT BY FULTON.

VII.

ALL THE COUNTS OF THE DECLARATION WERE SUPPORTED BY EVIDENCE, AND THE ISSUES RAISED WERE PROPERLY LEFT TO THE JURY, AND IF THE EVIDENCE SUPPORTED ONE GOOD COUNT OF THE DECLARATION, THAT WOULD BE SUFFICIENT TO SUSTAIN THE ACTION.

(In this connection, see authorities cited under point III.)

ARGUMENT.

I.

THE CONSTITUTIONAL QUESTION RAISED IN THIS CASE IS NOT A SUBSTANTIAL POINT UPON WHICH THE DETERMINATION OF THE CASE DEPENDS.

In connection with the first point we present for the consideration of the court, we respectfully direct the attention of the court to the suggestions in support of our printed motion to dismiss the writ of error, heretofore filed in this cause. We discussed therein the points and authorities we deemed pertinent to this question and desire to avoid trespassing on the time and patience of the court by needless repetition. For the convenience of the court, however, we recapitulate as concisely as possible the points upon which we rely in support of the position we take with regard to this question before the court.

Plaintiff in error bases its contention that the Mining Act is unconstitutional upon the theory that Section 7, paragraphs "D" and "F" provides for an examination as to competency to be taken by persons seeking certificates as either mine manager or mine examiner and Section 8, paragraphs "E" and "G" makes it unlawful to employ any person in either of the aforesaid capacities unless he holds a certificate issued by the state mining board, while Sections 16 and 18 of the act impose specified duties upon the mine manager and mine examiner, respectively, thereby, it is claimed, restricting the employer in his selection of

his servants and to some extent taking from him the control of such employes, and at the same time making him responsible for their acts and omissions in violation of the statute.

This theory, we contend, is without foundation, for the reason that the employer's choice is not limited to an individual or a small class but in fact his choice is only restricted to those who have been able to prove their fitness to take the responsible positions offered them and the duties required of them amount to no more than the duties imposed upon the mine owner personally by the statute, the common law and by the law of humanity, to make the surroundings of his servants as free from danger as possible considering the nature of their employment.

Again, we claim that on the face of the record it is obvious that the point contended for by plaintiff in error is not substantially involved herein, nor is it necessary to the determination of the case.

The declaration in this case as it now stands consists of eight counts based upon alleged violations of various sections of the Mining Act of Illinois. The first of the eight counts (see record 4 and 5) is based upon Section 19 of the Mining Act, title "Ventilation" which section we maintain imposes the duty to properly ventilate the mine and see that proper air currents are maintained therein directly and personally upon the mine owner, entirely distinct from the duties which are required to be performed by the mine manager and mine examiner by Sections 16 and 18 of the Act. We therefore contend that if this first count is found by the court to be based upon Section 19 and that sec-

tion is held to be not repugnant to the Constitution of the United States, as contended for by plaintiff in error, then there being no substantial constitutional question involved in this dispute necessary to its determination, the writ of error should be dismissed and the judgment of the trial court affirmed. Under Point I, of "Points and Authorities" herein we have set forth the section of the Illinois Practice Act, which provides that, "whenever an entire verdict shall be given on several counts the same shall not be set aside or reversed on the ground of any defective count if one or more of the counts in the declaration be sufficient to sustain the verdict." (See also cases cited under "Points and Authorities" 1). It is provided by the United States statutes that the practice in the Federal Courts in civil cases other than equity and admiralty causes shall conform to the practice of the court of the state within which the Federal Courts are held. We contend therefore that the verdict in this case being general, brings the case within the rule of practice cited.

It has been uniformly held by this court that in order to invoke the judicial power of the court *the constitutional question involved must be a real and substantial point in the controversy upon which the determination of the case depends.* (See cases cited under "Points and Authorities" I.) If, upon an examination of the record the court finds that this first count of the declaration is based upon a section of the Mining Act, not subject to the objection raised by counsel for plaintiff in error herein, then the constitutional point sought to be injected into this case is not at all necessary to the determination thereof.

Even if certain sections of the Mining Act are *prima facie, open to the constitutional objection raised by* plaintiff in error, that would not by any means invalidate the entire act, and if it be determined that the first count of the declaration is based on a section of the act not open to question in this regard it will be sufficient to sustain the action. (See cases cited under "Points and Authorities" I.)

If the court holdes with us on this first proposition, we assume it will decline to consider the other questions presented by plaintiff in error for its consideration and therefore we desire at this time to renew our motion to dismiss the writ of error herein and to affirm the judgment of the Circuit Court.

II.

THE MINING ACT OF ILLINOIS IS NOT REPUGNANT TO THE CONSTITUTION OF THE UNITED STATES.

A great many cases have arisen in Illinois based upon the Mining Act, and the Supreme Court of Illinois has had occasion to construe the act under every theory, we believe, that the ingenuity of counsel has been able to advance as to the validity of the various provisions of the act.

It has always been the policy of this state to guard with great solicitude the persons and lives of miners and in order to insure the enactment of proper legislation to safe guard them as far as possible the State Constitution imposes upon the legislature the duty of passing laws to carry out this policy (Sec. 29, Art. 4,

Ill. Constitution of 1870, "Points and Authorities" II). The Mining Act as it now appears upon the statute books of Illinois is the result of many revisions and amendments all intended to more fully protect the coal miner and his family ("Points and Authorities" II). If the court should adopt the theory of plaintiff in error that the owner of a coal mine is not liable for the acts and omissions of the mine manager and mine examiner, employed by him in the coal mine simply because they are required to obtain certificates of competency from the State Mining Board and because certain duties required of them are enumerated by the statute, it would absolutely nullify the intended purpose of the act. As a rule these coal mines are owned by corporations who can only act through their agents, servants and employes, and the only servants and agents of these mining companies who stand as the vice-principals of the company in the coal mine are the mine manager and mine examiner. These men are seldom so financially responsible as to be able to respond in damages to the operative coal miner or his family who may suffer by reason of the negligence of such vice-principal, and if the mine owner be allowed to delegate all responsibility in this regard to these irresponsible employes, the injured person would be without remedy to recover compensation for any loss and injury he might sustain while working for such mine owner. Such a condition is repugnant to the letter and the spirit of the Constitution of Illinois, and to the Mining Act passed in obedience to the constitutional requirement. The question raised by plaintiff in error that the mine owner should not be held re-

sponsible for the acts of the mine manager and mine examiners has been passed upon repeatedly in Illinois.

This case when first tried in the United States Circuit Court was taken from the jury and a judgment entered in favor of plaintiff in error. A writ of error was sued out and the case taken to the Circuit Court of Appeals for the Seventh Circuit. (*Fulton* v. *Wilmington Star Mining Co.*, 133 Fed., 193-7.) In that court the same theory was advanced as to the constitutionality of the act as is here presented by plaintiff in error, and the same authorities were presented to that court that are now presented to this court in support of the theory advanced, and the court refused to follow those cases as being against the authority of Illinois and not in conformity to the spirit of the Constitution of Illinois, and the legislation enacted in conformity thereto. The Supreme Court of Illinois in the very late case of *Henrietta Coal Co.* v. *Martin*, 201 Ill., 460-6-7 has disposed of the very same proposition and the cases from other states now presented to this court in support of the contention of plaintiff in error were cited to the Illinois Supreme Court, and that court refused to follow the authorities presented. The same question in substance was presented to this court in the case of *Sherlock, et al.* v. *Alling, Admr.*, 93 U. S., 99-105-108, and it was held that the master was not relieved from liability for his servant's act simply because his choice was restricted to a class who were obliged to pass an examination as to their competency before taking positions. In the case of *Consolidated Coal Co.* v. *Senigar*, 179 Ill., 370-4-5, the Supreme Court of the state disposed of this contention.

We have quoted so fully from the cases cited in support of our position under "Points and Authorities II.," that we do not feel like burdening the court with again setting forth here excerpts from the opinions in the cases relied upon, but respectfully direct the attention of the court to the quotations hereinbefore set forth.

The Mining Act is a matter of strictly local policy within the State of Illinois and the decisions of the courts of other states have no bearing upon the question except perhaps upon points in doubt. It will be readily seen that no doubt exists as to the points raised by counsel for plaintiff in error in this case. The language of our own court could not be clearer and stronger than it is. At common law the mine owner would unquestionably be liable for the negligent acts of its vice-principals in charge of the workings of the coal mine, and if the law of Illinois by compelling him to employ men whose competency has been certified to by the State Mining Board shall be held to relieve him from all liability for their acts, it simply upsets the entire policy of this state with regard to the protection of its coal miners and renders null and void all legislation passed for their protection, as well as the long and uniform line of decisions rendered by the Supreme Court of the state construing the act involved. A glance at Section 7 of the Mining Act, paragraphs D and F, which set forth in substance the nature of the examination which the mine manager and mine examiner must take before receiving their certificates will show to the court that it is not of a highly technical nature but simply sufficient to satisfy the Mining Board that the applicants are sufficiently com-

petent to fill positions and perform duties where the lives of hundreds of men, sometimes, depend upon their judgment and knowledge. The mine owner himself, may, if he choose, take this examination and perform the duties required, or if he does not choose so to do he has so large a class of men to choose from that his choice is practically unlimited and as the courts have held, upon the slightest sign of incompetency the employer has the unrestricted right to discharge the incompetent employe and replace him with one worthy of the position. If the choice of the employer was limited as in the Pilot cases, to the first individual presenting himself for employment, it would be a very different proposition, and that distinction has been repeatedly recognized by the courts in passing upon questions similar to that presented here. The Circuit Court of Appeals in its opinion in this case (133 Fed., 197), cite a number of the cases presented in support of the contention of plaintiff in error in this case and state:

> "Some of these cases were under the pilotage laws requiring that a ship nearing port should take on the *first* pilot who hailed the vessel or be liable for full compensation for such pilot. The shipmaster's choice was thus limited, not to a class, *but to an individual. This difference creates a substantial distinction between those cases and the case under consideration.*"

We cannot see that the constitutional rights of plaintiff in error are abridged in any degree by the Mining Law of Illinois or any section thereof, or that its common law liability for the negligence of its vice principals is to an unwarranted extent enlarged.

III.

CONSTRUCTION OF THE MINING ACT BY THE SUPREME COURT OF ILLINOIS.

An examination of the Illinois cases cited under point III will show the court how important the Supreme Court of this state has regarded the laws enacted for the protection of miners and their families.

In *C. W. & V. Coal Co.* v. *The People,* 181 Ill., 270, the court says, on page 276:

> "The mining of coal is recognized as a dangerous and hazardous business, and is a productive industry of the greatest importance. For many years in this state many thousands of men have been engaged in that character of work, and a proper safeguard of their lives and health *is a matter of so great interest and necessity that no subject can be mentioned where there is a more positive necessity for the exercise of the police power than in seeking to subserve their safety.*"

The mine owner has always been held liable for the willful violation of the statute by the mine manager and mine examiner.

In the two very late cases of *Henrietta Coal Co.* v. *Martin,* 221 Ill., 460-6, and *Riverton Coal Co.* v. *Shepherd,* 207 Ill., 395-9, the Illinois court has held these employes to be vice principals of the mine owner (Point III), and that he could not delegate the duties he owed to the operative coal miner to these men so as to relieve himself of liability for their failure to observe the provisions of the statute.

The courts of Illinois have uniformly held, that any

act or omission in violation of the statute on the part of the mine owner or his representative in the mine, consciously and knowingly done or omitted, was "willful" within the meaning of the act.

Odin Coal Co. v. *Denman*, 185 Ill., 413-418, and cases cited under Point III.

Wilson testified (Rec., 70):

"On that Sunday morning from past experience *I knew that there was gas in the west roadway.* I knew that was why the fan was put in; we all knew that. *I knew those men were going there to work and were expecting to start in at seven o'clock in the morning.* I didn't get there quite at seven. *I permitted those men to go into the mine knowing there was gas in the west roadway.*"

Pierard testified (Rec., 34):

"I knew at the time there was gas in the mine in that section; always had some in it. * * * *I didn't make any effort to get the gas out.*"

In many other places in the record these vice principals of the mine owner admit their knowledge of the presence of gas in the mine and we therefore contend that their acknowledged failure to clear the mine and render it safe for Fulton to work in was a violation of the requirements of the statute committed knowingly and consciously and therefore under the decisions of the Illinois Supreme Court committed willfully.

Plaintiff in error being a corporation could only act through its agents and employes, and in this coal mine the only representatives of the owner in authority were the mine manager and examiner, therefore if this mine owner be held not liable for their acts of negligence, it escapes entirely and the widow and children of the dead coal miner are denied the finan-

cial relief intended to be secured to them by the Constitution and laws of Illinois.

In this connection we draw the court's attention to the rule cited under point III, that the decisions of the highest courts of the state construing a statute of such state are conclusive and as binding as the text of the law, especially where the act is passed in conformity to the requirement of the state Constitution and the statute itself relates entirely to local policy.

Balkam v. *Woodstock Ins. Co.*, 154 U. S., 177-189. (And other cases cited.)

IV.

PROXIMATE CAUSE.

Counsel for plaintiff in error complain of the instructions of the court to the jury, as to the proximate cause of Fulton's death. We cannot see that any real or just fault can be found with the instructions.

Counsel endeavor to convince the court that the command of Wilson to Fulton and Schmitz to go into the west roadway was an act which might be considered as the efficient or proximate cause of Fulton's death and insist that this question should have been considered distinct and separate from the question as to whether or not there was gas in the mine. We cannot see how this act of Wilson's standing alone could have caused Fulton's death. It is only when taken in connection with his failure to clear the mine from gas, that the order of Wilson has any bearing on the case.

The first count of the declaration is based upon the

fact, that plaintiff in error failed to ventilate its mine, and to maintain therein sufficient currents of fresh air for the safety of the men working therein, and by Sec. 19 of the Mining Act the mine owner is required to see that his mine is properly ventilated and made safe for the miners to work in. The fact that the west roadway was full of gas and thereby made dangerous for Fulton and Schmitz to work in, was the primary act of negligence which constituted the proximate cause of the death of Fulton and the injuries to Schmitz. If plaintiff in error had fulfilled its duty as required by the statute in the matter of ventilating this roadway, Wilson's instruction to the men would have been an entirely immaterial matter and of itself could necessarily cause them no harm. It was only taken in connection with the principal or primary act of negligence that it could have caused any harm to the workmen.

The testimony of Schmitz to the effect that Wilson told him and Fulton not to wait, but to go into the mine (Rec., 56), as well as his evidence that Wilson was so close to them when they pushed the car into the west roadway that he had to push him back with his hand, so that the rails would not touch him, and that Wilson was looking at them all the time (Rec., 53), *was simply introduced to show knowledge on the part of this representative of the mine owner of the fact, that these men were going into that roadway to work.*

The instruction of the court complained of (Rec., 97-98) if read in its entirety in connection with the other instructions of the court, placed this question before the jury as strongly as plaintiff in error was entitled to have it placed.

Counsel admit that gas in the mine was essential to the fatal result, but contend that in law that fact might not be the efficient cause of such result.

Of course if the presence of the gas was not itself due to the negligence and violation of the statute by plaintiff in error, there might, perhaps, be some color to the argument of counsel, but in this case the presence of gas in the mine at this time and under the circumstances shown by the evidence herein could only be due to the negligence of plaintiff in error by and through its vice-principals in the mine.

On the other hand the order of Wilson would have done no harm had the gas not been present, and taken alone, without the presence of gas, it was not negligence to order Fulton into the roadway and such order would have caused him no harm.

In this connection we would like to draw the attention of the court to portions of the testimony of Pierard and Wilson showing their knowledge of the presence of gas in the west roadway and of its dangerous extent, and of their utter disregard of their duty to clear it out.

Pierard said (Rec., 34):

> "The fan that was operated for the purpose of clearing gas out of the mine was at the bottom of the shaft, I passed right beside it to get at the bottom of the mine, it was not then in operation. *I did not start it nor try to start it.* I knew at the time there was gas in the mine in that section, always had some in it. I didn't know that Fulton and Schmitz were going into the section, into the west. *I knew they were coming down into the mine to lay switches somewhere. I didn't make any effort to get the gas out.*"

On page 39 of the record he said:

"Q. Did you ever find gas in there?

A. Yes, sir.

Q. Did you know that gas was in the habit of communicating (accumulating) here?

A. Yes, sir.

Q. Did you know it would be there unless it was taken out?

A. Yes, sir."

On page 45 of the record, speaking of his usual habits, he said:

"I started the fan in the morning about half past four or five o'clock before the fan was started, sometimes we were driving on the road, sometimes timbering. Before the men came down I went in to test the west entry; to examine the mine. There was no gas anywhere *except in the west entry. There had been gas in there a long while, four or five months; three or four months.* I never made a test to see exactly how long it took the fan to clear out. I generally went in with a safety lamp, always at six o'clock or a little after."

Wilson testified (Abst., 64):

"We found gas in the west roadway about 50 or 60 feet from the bottom of the shaft; then we found gas there right along from that time up to the time of the accident and after. We started to find the gas about 50 or 60 feet from the bottom of the shaft and there was gas constantly all the time right along after that."

On page 70 he said:

"On that Sunday morning from past experience I knew that there was gas in the west roadway; I knew that was why the fan was put in; we all knew that. *I knew those men were going there to work and were expecting to start in at seven o'clock in the morning.* I didn't get there quite at seven. *I permitted those men to go into the mine knowing there was gas in the west roadway.*"

The foregoing excerpts from the testimony show knowledge on the part of plaintiff in error of the dangerous conditions in the mine by and through its vice principals and the proximate cause of Fulton's death was the failure to remove the dangerous agency or to obviate and lessen the danger and give due and proper warning by one of the methods provided for by statute as averred in the various counts of the declaration (Rec., 5-16-19-22-23-24).

V.

CONTRIBUTORY NEGLIGENCE ON THE PART OF FULTON WOULD NOT DEFEAT THE RIGHT OF DEFENDANT IN ERROR TO RECOVER IN THIS CASE.

The Supreme Court of Illinois has uniformly held that contributory negligence on the part of a workman injured in a coal mine would not defeat his right to recover from the mine owner for injuries sustained by him as a consequence of any act or omission on the part of the owner, operator or manager of the mine in willful disregard of the statute; in other words a violation of the Act consciously or knowingly committed or acquiesced in. Under "Point V" we have cited many cases decided by our Supreme Court holding this doctrine in the clearest and strongest terms. For convenience we repeat the language used by the Illinois Supreme Court in *Carterville Coal Co.* v. *Abbott*, 181 Ill., 495, 502, 503, where the court said:

> "*Mere contributory negligence on the part of a miner will not defeat a right of recovery* where he is injured by the willful disregard of the statute, either by an act of omission or commission, on the

> part of the owner, operator or manager. To hold that the same principle as to contributory negligence should be applied in case of one who is injured in a mine because the owner, operator or manager totally disregarded the statute, as in other cases of negligence, *is to totally disregard the provisions of the constitution, which are mandatory in requiring the enactment of this character of legislation, and would destroy the effect of the statute* and in no manner regard the duty of protecting the life and safety of miners."

The court will note that the decisions of the Illinois Supreme Court are in conformity with the spirit of the constitution and legislation of this state and express forcibly the importance given to this class of legislation in this state and the solicitude with which the highest courts of the state seek to effectuate the evident policy of the law makers. Under the decisions of the Illinois Supreme Court above referred to contributory negligence on the part of Fulton would not defeat the right of defendant in error to recover herein, but it is urged by counsel for plaintiff in error that he was guilty of more than contributory negligence and that his acts amounted to a willful disregard of the statute. The evidence does not by any means support our opponents' theory in this regard.

Schmitz testified (Rec., 53):

> "I received instructions from the mine manager, Wilson, at the bottom of the shaft that morning. I went down *straight south* close to the fire boxes and *Wilson hollered after me and told me to go and help Sam Fulton; help push that car on the west road and help Sam Fulton lay the switch.* * * * When I started to help Fulton push the car Mr. Wilson, the mine manager was close by the little engine that ran the fan. * * * When Fulton and I started to push the car away Wilson

was close up to the little engine; *right close to me when we pushed the car.* * * * *I had to push Wilson back with my hand so as—rails would not touch Mr. Wilson.*

* * * * *

(Rec., 55.) When I went straight south I left the boss and Sam at the bottom of the shaft, that is Wilson and Fulton. I went straight south to Pierard and *it was about ten minutes after that when Wilson called to me.* * * * *He told me to help Sam, nothing more.*

(Rec., 56.) Q. What did Wilson say to Fulton?

A. *Boss no tell to wait, he told to go.*

Q. What statement, if any, was made to Fulton by Wilson?

A. *Just tell me to go; that all.*"

The above testimony is quoted to show that *Wilson knew* positively that Fulton and Schmitz were going into the west entry immediately, although he admitted that he knew it was full of gas.

On record p. 70, Wilson, the mine manager, said:

"On that Sunday morning from past experience *I knew that there was gas in the west roadway.* I knew that was why the fan was put in; we all knew that. *I knew those men were going there to work and were expected to start in at seven o'clock in the morning.* I didn't get there quite at seven. I PERMITTED *those men to go into the mine knowing there was gas in the west roadway.*"

Pierard, the mine examiner testified (Rec., 34):

"I knew at the time there was gas in the mine in that section; always had some in it. I didn't know that Fulton and Schmitz were going into the section into the west. *I knew they were coming down into the mine to lay switches somewhere. I didn't make any effort to get the gas out.*"

He further testified (Rec., 35):

"After the fan was started I walked in the south room, Schmitz and Capet walked in with me. I saw Wilson walking in the end of the south road. * * * Schmitz came right up where I was and stayed there two or three minutes and then he went back to the bottom.

(Rec., 36 and 37.) Q. What did you hear Wilson say to Schmitz when he hollered at him?

A. He said, '*You will work with Fulton today,*' something to that effect; something like that, I could not say exactly now.

(Rec., 38.) I could not say about what time it was in the morning that I went down in the mine; about seven o'clock. * * * I couldn't say how near to eight o'clock it was that morning before the fan started. My best recollection and judgment as to the time is that I don't think it would exceed much after half past seven; around thirty-five minutes.

(Rec., 39.) Q. Did you ever find gas in there?

A. Yes, sir.

Q. Did you know that gas was in the habit of communicating (accumulating) here?

A. Yes, sir.

Q. Did you know it would be there unless it was taken out?

A. Yes, sir."

Moses Capet testified (Rec., 84):

"When Wilson came in he hold that 2x4 piece while I cut it. *He hollered to Schmit.* I don't know what he said to Schmit; *told him to help Sam Fulton.* When he hollered to him Schmit was about 25 feet further south in the south roadway with Ed Pierard and when Wilson called him, Schmit passed by us and went to the bottom. Wilson stayed there with him; I don't know for sure whether he go to the bottom or not. When Wilson called to Schmit, *Schmit was working with Ed Pierard.* After Wilson called him, Schmidt go to the bottom.

Q. What did Wilson do?

A. That is before Wilson came to me, that is before when he called Paul Schmidt.

Q. Where was Wilson when he called Schmidt?

A. *He is there on the bottom and he come after Schmidt go past there;* understand?

Q. Well, I don't quite understand, no.

A. He hollered Paul Schmidt to come. Paul come by me.

Q. Who was on the bottom?

A. Wilson.

Q. *Wilson was on the bottom.*

A. And Sam Fulton. And then he called Schmidt?

A. Called to Schmidt there before he came to me, before Wilson came with me. * * *

Q. Now after he called to Schmitz, Schmitz came out?

A. Yes, sir.

Q. What did Wilson do when Schmitz came out?

A. Well, may be he talk with him what he had to do. I don't know what he said. Wilson then came with me to help me. * * *

Q. How soon did he come in to help you?

A. Oh, may be a few minutes after.

Q. What did he do?

A. He held some 2x4 and cut it because it swung all over you along on top of the boxes. He stayed there with me fixing the boxes maybe five or six minutes and then the explosion came and knocked me down and put out our lights."

Wilson testified (Rec., 66):

"When I got into the south road I told Smith that he had to help Fulton to-day. Smith was in the south road further south than where I was. * * * I should think I remained in the south entry from five to six minutes. Of course I can't tell to a minute or two either way, but I should judge it would be in the neighborhood of five or six minutes. When I called to Schmitz to help

Fulton, *Schmitz came out and walked past me right to the bottom.* I didn't see him after that. My back was toward the bottom."

On record, 73, Wilson testified:

"*I told Schmitz he was to help Fulton.* I think that is the words I used, as near as I can remember; that he was to work with Fulton or help Fulton. * * * Schmitz said, 'All right,' and came out. He passed me where I was. *I had no conversation with Schmitz except that.*"

Of course Wilson denied that he directed Fulton and Schmitz to go immediately into the west entry, but said that he told Fulton to wait until the west entry was clear of gas. He admits, however, that he gave no such instruction to Schmitz. He also testified that he told Fulton that he would go into the west entry with a safety lamp, but the record shows he did nothing of the kind. (Rec., 66.) There was in this case, as in every other case of a similar nature a direct conflict in the testimony on some essential points, but as the record stands, Wilson is directly contradicted by Schmitz, who says that Wilson told them not to wait, but to go, and the physical facts and circumstances testified to tend to bear out the testimony of Schmitz.

Wilson said that he told Fulton to wait until the gas was cleared out, but at the same time admits he called Schmitz *from his work in the south entry* and instructed him to assist Fulton. It is not reasonable to suppose that he would call Schmitz from his work for the purpose of having him *sit idly* at the bottom of the shaft waiting for the gas to clear out and the jury evidently did not consider his testimony in this regard as credible. The testimony of all the witnesses as to the manner in which Wilson called Schmitz and the posi-

tion occupied by the men at the time is perfectly consistent. It will be noted that Capet especially testifies that when Wilson called Schmitz he was at the bottom of the mine and remained there with Fulton and Schmitz for some few minutes before going into the south entry. Just what his conversation was during those few minutes no one but himself and Schmitz have been able to tell and the account given by Schmitz contradicts Wilson's account in every material point, but the record shows that Wilson was in the south entry, but a very few minutes after leaving Fulton and Schmitz before the explosion occurred. Capet says that it was about five or six minutes after Wilson returned to assist him that the explosion occurred. *This was just about sufficient time to allow Fulton and Schmitz to reach the point in the west entry, where the explosion occurred with their carload of tools and material. Therefore it is reasonable to assume that these men departed into the west entry at about the same time that Wilson started to go into the south entry, and this bears out the testimony of Schmitz that he told them not to wait, but to go ahead into the roadway and also the testimony of Capet that Wilson, after calling Schmitz, remained at the foot of the mine with him and Fulton until just about the time when they must necessarily have started for their destination.* There can be little doubt that the jury who heard the testimony of the witnesses and saw them, thus construed their evidence.

There is nothing in the record that justifies the theory that Fulton willfully violated the statute or even that his act in going into the mine was necessarily contributory negligence in the face of the evidence as

to the direct command of Wilson, the officer in authority there, to go into the mine and not to wait. It is never presumed that a man will knowingly incur physical pain or death when he can avoid it (see Point V). And in the case of *Pawnee Coal Co.* v. *Royce,* 184 Ill., 402-15, the court says:

> "The law goes further, and provides that 'no person *shall be allowed to enter the mine* until such examiner shall have reported all of the conditions safe for beginning work.' The report itself did not state that all of the conditions were safe for beginning work, and taking the evidence for the plaintiff as true, as we must for the purposes of this discussion, the appellant had actual notice of the unsafe condition of this entry. Nor does it make any difference that plaintiff did not look for the record, under the facts of this case. Whether he relied on the statute or on the promise of the appellant to repair, *he had the right to assume that the appellant would keep its promise, and he also had the right to assume that it would comply with the statutory requirement, and was not bound to ascertain each morning whether it was doing so.*"

We believe that Fulton when he went into the west entry of the mine assumed, as the authorities hold he had the right to assume, that the mine was safe for him to work in and no other theory is reasonable—in fact if he had gone into the mine willfully, knowing the existence and extent of the danger therein, as plaintiff in error would have the court believe, it would have amounted to a suicidal intent upon his part *and on the part of Schmitz,* who evidently went into the mine from the same motive that inspired Fulton, whatever that motive was.

However this may be, it has been held in a long line

of decisions and we believe without exception to the rule, that whether or not an act of negligence amounts to willfulness or wantonness *is always a question of fact to be determined by the jury.* We maintain that in this case the verdict of the jury under the very full and clear instructions of the court as set forth on record page 97 is conclusive of this question.

VI.

THE JURY WERE FULLY INSTRUCTED AS TO THE EFFECT OF A WILLFUL VIOLATION OF THE MINING ACT BY FULTON. (Rec., 97-98.)

Counsel for plaintiff in error complain of the refusal of two instructions offered by them and found on page 107 of the record. The first instruction is to the effect that if the jury believe that Sam Fulton at the time he was killed was engaged in a willful act which endangered the lives or health of persons working in the mine with him and the security of the mine or its machinery and that such willful act contributed to his death, then the plaintiff cannot recover in this cause.

The court undoubtedly refused this instruction for the reason that there is absolutely no evidence in the record to the effect that Fulton was engaged in such a willful act as that described in the instruction, and the instruction as framed is so very misleading that without explanation it would not convey to the jury what character of willful act was referred to.

The instruction as offered fails to state that the willful act referred to therein must be an act in violation

of the statute and if it had been given to the jury as offered it would certainly have been very difficult for them to have decided just what kind of a willful act was meant. Unless the act referred to was in violation of the statute and was done consciously and knowingly it would not come within the definition of the word "willful" as used in the statute and in the decisions of the court construing the statute. As offered the instruction might be construed to include acts which would constitute nothing more than mere contributory negligence and that would not have defeated the right of defendant in error to recover. The court gave to the jury a much better instruction, which is found on pages 97 and 98 of the record, and which covers the ground intended to be covered by the refused instruction, and the instruction as given by the court is as favorable to the contention of plaintiff in error as could possibly be expected.

The second instruction, the refusal of which is complained of is clearly repugnant to the decisions of the Supreme Court of Illinois holding that contributory negligence is no defense to an action of the nature of this one and the instruction offered is simply framed on the theory that negligence, if any, on the part of Fulton would defeat the right of defendant in error to recover herein. Under other headings we have discussed the facts and circumstances leading up to and culminating in Fulton's death, and have also presented to the court the law of Illinois in relation to contributory negligence and do not care to burden the court at this time with mere repetition of those matters already fully discussed. We believe the court will find from a perusal of the instructions given to the

jury by the trial court that the law relating to this case was very fully and fairly presented and that plaintiff in error has no ground for complaint in that regard.

VII.

ALL THE COUNTS OF THE DECLARATION WERE SUPPORTED BY EVIDENCE AND THE ISSUES WERE PROPERLY LEFT TO THE JURY, AND IF THE EVIDENCE SUPPORTED ONE GOOD COUNT OF THE DECLARATION, THAT WOULD BE SUFFICIENT TO SUSTAIN THE ACTION.

Plaintiff in error complains that the evidence did not support the second, third, fifth and sixth counts of the declaration. In this connection we respectfully refer the court to Point I, under which is cited the section of the statute of Illinois and the Illinois authorities to the effect that whenever an entire verdict is given on several counts the same shall not be set aside or reversed on the ground of any defective count if one or more of the counts be sufficient to sustain the verdict. Several distinct violations of the statute were alleged and proved in the case and under the law this was surely sufficient to sustain the verdict of the jury. As to the second and third counts alleging failure to provide cross-cuts and stoppings in the mine, Pierard testified that there were no cross-cuts for the reason that it was a long wall mine, and there being no cross-cuts, there were necessarily, no stoppings. This evidence went to the jury simply for what it was worth and this phase of the case certainly did plaintiff in error no harm and had no tendency to confuse the jury. Several violations of the statute were actually proved

so clearly and strikingly as to give the jury ample foundation for finding the verdict against plaintiff in error, without regard to the negligence alleged in the second and third counts. The court in its instructions (Rec., 94-5-6) discussed the various counts of the declaration to the jury and instructed them as follows (Rec., 96):

> "If you believe from the evidence that any of the counts in that declaration are sustained by the preponderance of the evidence, then it is your duty under the further instructions of the court to find for the plaintiff."
>
> "If you believe from the evidence that all the counts have not been sustained; if you believe, that is, that none of the counts have been sustained by the evidence, you shall, under the further instructions of the court, find for the defendant."

The court thus instructed the jury on the theory that we have contended for and under the law it made no difference whether or not the evidence fully sustained the counts referred to or not as long as other counts of the declaration were sufficiently supported.

As to the fifth count of the declaration we have heretofore cited sufficient of the testimony to show that there was ample evidence to the effect that plaintiff in error failed in its duty to refuse to allow Fulton to enter the mine except under the direction of the mine manager until all the conditions were made safe. There is no dispute but what the conditions were very unsafe and it is also admitted that as far as his entry into the west roadway was concerned, he was not accompanied by the mine manager, but on the contrary Wilson, after ordering him into the roadway left him to his fate and went himself into the south entry. This we maintain

is in direct violation of the meaning and the spirit of the act and the fact that Fulton was in the mine, under *the general supervision of the mine manager* has no bearing on this question. The act evidently intended that when the conditions in the mine were unsafe the men should only work there under *the special and personal direction* of the mine manager; he in contemplation of the law was supposed to be a competent judge of the risk and hazards assumed by those compelled to work in the dangerous places. It certainly did not mean such direction as Wilson could give to Fulton while he was in the south roadway and Fulton was in the west roadway some 150 feet away from him with a thick wall of coal between them. The evidence heretofore cited will show to the court that the jury had sufficient foundation for finding that plaintiff in error was guilty of a violation of the statute as charged in the fifth count of the declaration.

The sixth count of the declaration was also amply supported by evidence. It is based on the failure of plaintiff in error to watch over the ventilating apparatus and air currents in the mine, and in case of accident to fan or machinery by which the currents are obstructed or stopped, to at once order the withdrawal of the men and prohibit their return until thorough ventilation has been re-established. We take it that the only reasonable construction of this section of the statute is that in case the machinery is found to be out of order at any time so as to in any way imperil the lives or health of the men employed in the mine, it is the duty of the owner and his representatives to order their withdrawal and prohibit their return until

ventilation has been re-established. *It does not necessarily refer to a sudden accident by which the fan or machinery is rendered defective.* It is not the cause that is evidently considered as vital by the act, but the effect—in other words the danger to the men at work there. Any defect whether of long standing or caused suddenly, if it produces a dangerous result, as soon as discovered the statute imposes on the mine owner the duty of providing for the safety of the men employed in the mine.

Pierard testified (Rec., 34) there was a valve at the pump. The valve was all right *with the exception of the wheel. There never was a wheel on there. There was a place to put a wheel.* Mr. Wilson put the valve on. *There was no wheel to it.* It was started with a wrench. *If you wanted to tighten it up you tightened it with a wrench.* * * * (Rec., 35.)

> "I don't know how it was opened up that morning at that particular valve. I think Mr. Wilson opened it up. I could not say I saw him. I think he got that wrench on top." * * *

Schmitz testified (Rec., 54):

> "I was at the bottom and Wilson and Fulton came down. I waited until Mr. Wilson turned on the steam. He couldn't do it. *The valve was broken.* He went up on top to get a monkey wrench, turned the steam on a little engine which turns the fan. *The valve was broken. They used a wrench."*

Wilson testified (Rec., 70, 71):

> "Q. How long before that Sunday morning did you know that the wheel, that part of the valve was off the fan?
>
> A. *There never was no wheel on the fan until*

the time I put it on. There was a stem there; there had been a wheel on at one time.

Q. What happened to that wheel?

A. *I never seen it.*

Q. Did you make any effort to secure a wheel to put on that valve?

A. *No, I didn't think it was necessary.*"

On page 72, speaking of the monkey wrench which was used as a substitute for the wheel which should have been on the valve, Wilson said:

"I left this thing there and I think it was shaken off in the morning when I got there. It was a monkey wrench. *Then I had to go up on top and find another* and when I found the other and came down I was able to turn the valve and let the steam out."

Under the circumstances as shown by the evidence in this case the absence of the wheel from the valve of the engine was very important as *it delayed the starting of the machinery* until all the men were assembled at the bottom of the shaft and Fulton was ready to go into the west entry. If the wheel had been in place the machinery could have been started earlier and have given the fan a greater chance to dislodge the gas which had accumulated in this roadway. Taken in connection with the other evidence in the case it was certainly not error to submit this question to the jury and as there were other counts in the declaration not subject to the objections raised by plaintiff in error it seems immaterial whether or not this count standing alone would have been sufficient to predicate the case upon.

We do not agree with counsel for plaintiff in error that the Mining Act should be construed strictly and

this view has certainly never been entertained by the courts of Illinois which have taken great pains, as the court will observe from the citations herein contained, to construe the act liberally to effectuate its purposes and to carry out the intention of the Legislature. The evident spirit and purpose of the Act is such as to render a liberal construction of this Act essential or otherwise in many cases the real intention of the law makers would be defeated.

CONCLUSION.

We have only discussed those points in the case which we believe will be presented and argued by our opponents. Other points might be raised, but we believe that all the essential points have been discussed. In conclusion we desire to draw the attention of the court to the testimony of Minnie Fulton (Rec., 49). She testified that when her husband was killed they had five children, *the oldest being eleven years old, and the youngest about fourteen months old.* She testified that Fulton, at the time he was killed, was earning about $2.25 per day and had for a long time before that been earning the wages referred to; that he always worked steadily and supported his wife and family and that he brought his money home to her and that she used it in defraying the family expenses. Fulton at the time of his death *was thirty-six years old.* The verdict of the jury was for $4,000.

Evidence was introduced on behalf of defendant in error to show that the coal mine in question was actually being operated. (Rec., 50, 57, 59.) This evidence

was simply for the purpose of proving that the mine in question came within the definition of the word as used in the statute.

Plaintiff in error introduced several witnesses who attempted to prove knowledge on the part of Fulton of the dangerous conditions in the mine, but under the decisions of the courts it seems unnecessary to discuss that evidence, as we do not deem it pertinent to the issues in this case.

Fulton was killed on January 27, 1901, and therefore for nearly six years defendant in error and the little ones dependent upon her have waited for a final decision of this case hoping to receive the means of support and sustenance contemplated by the statute. By the persistent efforts of plaintiff in error, however, their hope has been deferred, and we respectfully submit that the judgment in this case should be speedily affirmed.

Respectfully submitted,

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